

# Rule of Law as Ideology

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My generation of 50-ish German lawyers has come of age under the impression that the USA has something essential to teach us: how to seek and find answers to legal questions without having to pretend that they are already dictated by the inherent reason of law itself. How to acknowledge the political, economic and social framework of law, the possibility of diverse opinions and interests, the fruitful political dynamics of the conflict between majorities and minorities. How to think of democracy and the rule of law as reciprocal conditionalities. How to do law in a non-authoritarian way. Law in context, critical legal studies, law and economics – you could learn that at Yale, in New York and in Chicago, and those who didn't manage to go there and do an LL.M. or PhD degree, like me, at least had people like Oliver Lepsius or Christoph Möllers who had and could tell what they had learnt.

Now, one might think, things seem to be changing. Gertrude Lübke-Wolff, the former *Bundesverfassungsgericht* judge known for the crystalline sharpness of her dissenting opinions, calls the US Supreme Court in a FAZ op-ed without much ado a “[dysfunctional court](#)”: too much politics, too little reason. Criminal law professor Tonio Walter, also in the FAZ (October 7, 2020, p. N3, not online as far as I can see), praises Antonin Scalia's textualism, of all features of US jurisprudence, as an exemplary “method of limiting interpretation”. So this is the best the USA have to offer us now? Does the German legal culture, based on learned textual exegesis, abstraction and the scientific-discursive search for truth, prove to be superior to the once so fascinating Anglo-Saxon openness in these times of crisis?

We Germans generally are very much enjoying ourselves right now, relatively speaking. This is hardly surprising, given Germany's current stability, in contrast to the epochal crisis which not only the United States but also the [British motherland of common law](#) are currently facing. We wouldn't allow ourselves to indulge in any self-satisfied backslapping uncritically, of course. This week, we have started an online symposium on whether or not a “[German legal hegemony](#)” exists in the European Union, on the initiative of [ARMIN VON BOGDANDY](#). He raises the hegemony question, on the one hand, with a view to the infamous PSPP ruling of the German Federal Constitutional Court and the impression of a German doctrinaire encroachment into the domain of European law, but on the other hand also with respect to the critics of this decision – including explicitly *Verfassungsblog* itself: Do we embody “an enlightened, soft neo-liberalism that is then imposed particularly on Central and Eastern European countries”? Are we guilty of “promoting Germanization”?

According to [BOGDAN IANCU](#), we are. The symposium includes a large number of articles extremely worth reading, but I would particularly highlight Iancu's contribution. In his view, for the past decade “the mainstream liberal discourse, also on the *Verfassungsblog*, has consisted in the incantation of one mantra: ‘populists’ are destroying ‘the rule of law’.” He sees a “rule-of-law ideology” at work that serves

to make invisible the social, political, and economic inequalities along with their liberal-urban profiteers in the Central and Eastern European countries concerned. EU accession, the Copenhagen criteria and the entire rule-of-law monitoring business are little more than a help- and fruitless attempt to prop up something like the appearance of the rule of law: Oh, everything goes swimmingly in Bulgaria, never mind if the omnipotent Attorney General keeps hounding adversaries of the government in the most frightful manner – as long as he is independent!

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20. Oktober 2020, 18:00 – 19:30 Uhr (via Zoom / Livestream)

Ende September 2020 stellte die Europäische Kommission ihren Vorschlag für einen neuen EU-Migrationspakt vor. Über die im Entwurf enthaltenen Neuerungen, alternative Vorschläge und über die Hintergründe der Verhandlungen diskutieren in diesem MPIL Momentum **Dana Schmalz**, **Catharina Ziebritzki** und **Christian Jakob**. Details und Anmeldung [hier](#).

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The question to what extent Bogdan Iancu's accusation hits Germany in particular, and more specifically Verfassungsblog, aside: I think he has a point.

The rule-of-law discourse turns into an ideology when it is used to blur and make invisible political conflicts of interest. This is the opposite of what the rule of law in a democracy is for: to keep the coexistence of political opposites possible. To keep it possible to have different opinions and interests, to argue, to compromise, to vote and to reach collectively binding decisions. To keep pluralism possible, by means of legal procedures and institutions.

If populism means that "ordinary people" should get a larger piece of the cake: I'm all for it. Redistribution is populist? Wonderful, keep it coming. My problem with authoritarian populism is not so much the populist part, but the authoritarian part: that it equates the "ordinary people" with the "real people". That it fuels its political engine with the very legal procedures and institutions which keep politics functional. That in doing so it not only reduces the law to dust and ashes, but also politics.

The hallmark of the rule of law is not necessarily that courts are maximally and radically independent from politics. The very term "rule of law" makes it clear that it is just that: rule, and thus as such in need of legitimation. You don't have to stand trial to know what it means to be subject to the power of those black-robed people up there. Who are they, anyway? This is a question every court has to put up with.

In Germany, the resounding answer is: the state. The *Rechtsstaat*! It is he who reigns supreme in his palace of justice, all robe, not man, and woe betide the judge who lets her colorful headscarf reveal her Muslim personality under that imposing *Recht-Staat* persona!

The American answer is much more open, unmasked, unprotected: They have been elected.

For all the undeniable problems the USA are facing at the moment: I don't think it's settled yet which answer is better.

I rather wonder whether a better explanation for the current contrast between German stability and Anglo-Saxon misery may be found elsewhere entirely. In Article 79 (2) of the *Grundgesetz*, for example. It requires a two-thirds majority in both chambers of parliament for constitutional amendments, a threshold low enough to keep fixing constitutional shortcomings a possibility in general but, at the same time, high enough to keep that power out of reach for the respective winner of the

election. This seems to me to be one of the truly beneficial features of the German constitutional order. In the US, constitutional amendments are too hard, in the UK too easy to achieve. How would both fare if they had an amendment rule like that?

## The week on Verfassungsblog

Talking about **headscarves**: In Berlin, a directive issued by the President of the Superior Court of Justice to allow Muslim trainee lawyers (*Rechtsreferendare*) acting as public prosecutors to wear a hijab in court has caused a dispute. The staff representatives believe they are allowed to ignore this regulation, among other things because it was not enacted as law. [KLAUS FERDINAND GÄRDITZ](#) provides constitutional education: A formal law is necessary to restrict the freedom of a fundamental right holder, but not to spare him/her that restriction.

This week's episode of our podcast "**We need to talk about the Rule of Law**", which we are organizing together with the German bar association DAV, also was focussing on the judiciary, and more specifically on disciplinary proceedings and their abuse by authoritarian regimes, the case in point obviously once again being Poland. How to solve the dilemma of keeping the abuse of judicial power sanctionable without abusing this sanctioning power itself was the topic of my discussion with three distinguished guests from Slovenia, Spain and Poland: [NINA BETETTO](#), [ADAM BODNAR](#) and [SUSANA DE LA SIERRA](#).

**Wojciech Sadurski**, the constitutionalist and law professor well known to all readers of Verfassungsblog, is currently experiencing first-hand how far Poland has strayed from the path of the rule of law. Last week, the defamation lawsuit brought against him by TVP, a public television station controlled by the ruling PiS party, was heard in a Warsaw court. [JOHN MORIJN](#) quotes Sadurski's statement in court – highly recommended reading.

The European Court of Justice has issued a verdict on Hungary's "**Lex CEU**" which, unsurprisingly, was found incompatible with EU law and in particular with the right to academic freedom. [RENÁTA UITZ](#) points out that Orbán is no longer caught unprepared by infringement judgments from Luxembourg, with his own constitutional court ready to use the Hungarian "constitutional identity" to tailor the binding effect of European law to his needs.

On the same day, a new ruling on **data retention** was handed down in Luxembourg, which clarifies that data retention without cause is incompatible with European fundamental rights, with some exceptions such as the fight against terrorism. As a politician, [SABINE LEUTHEUSSER-SCHNARRENBARGER](#) has worked hard to stop data retention and is accordingly satisfied with the judgement.

[TRISTAN RADTKE](#) writes on a problem which also has to do with data protection: the mining of data on the contract period of customers of electricity and gas suppliers with the aim of identifying **customers who are willing to switch** – a practice which calls for legislative action.

The UN Tribunal for the **Khmer Rouge** in Cambodia is facing closure after the proceedings against the defendant Ao An were dropped. [MALTE STEDTNITZ](#) examines the causes and consequences.

[AMAL SETHI and PRANNV DHAWAN](#) focus on a current democracy problem in **India**, posed by the speakers of parliament who help the ruling Bharatiya Janata Party (BJP) to push through its anti-democratic agendas.

So much for this week.

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All best,

Max Steinbeis

